IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1117

A. H. KASISHKE, CORALENA OIL COMPANY, a Delaware Corporation, and OLIVE DRILLING COMPANY, an Oklahoma Corporation,

Petitioners,

vs.

B. A. BAKER,

Respondent

REPLY BRIEF FOR PETITIONERS

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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The Petition in a summary manner states the facts in this case. Respondent instead of pointing out any inaccuracies in the "Summary Statement," makes the bold statement (Response, p. 2) that it "is shot through with errors of omission and commission." Then respondent invites this Court to make a careful examination of the record to find these "many contradictions," without any indication of what they may be. Such a response is neither helpful nor fair to this Court, and actually leaves uncontradicted the statement of the case as set out in the Petition.

Respondent next engages in the strange argument (Response, p. 1) that no "substantial rights of petitioners have been invaded" and that petitioners are seeking to have this Court "determine moot or academic questions in which they have no present interest"! Of course, petitioners have an interest in this case. The judgment below awards a one-tenth interest to respondent in the petitioner corporations' monies and in certain leases valued in excess of six million dollars. As the mandate and judgment have been stayed, we fail to see how the case has become *moot* and *academic*.

But the argument is a curious emasculation of the Rules of this Court controlling Certiorari. Certiorari is granted in the public interest, not for the convenience of individual litigants, and our Petition alleges *several* of the reasons generally considered by this Court as the basis for the allowance of the Writ (Pet. pp. 13-33).

Respondent next attempts to twist our statements (Pet. pp. 2-3, 14, 32, 33) that the decisions below will have far-reaching effects, particularly in the Tenth Circuit, into a request for a "binding uniform system regarding joint adventures" in the Tenth Circuit, to control the law of "Oklahoma, Kansas and New Mexico" (Response, pp. 2, 3). We make no such request and are sure that this Court will not be misled by such tactics.

Next, respondent does a complete about-face and now takes the *new* position that it makes no difference whether "*the court below erroneously held that the status of the parties was that of joint adventure*" (Response, p. 4). And this for the purpose of arguing that the relief afforded can be sustained *on another ground* than the single ground of joint adventure upon which all the findings of fact, conclusions of law, and both decisions below are based.

This change of position is made in attempt to get some benefit out of such cases as *Dike* v. *Martin*, 85 Okl. 103, 204 Pac. 1106.[1] But those cases are inapplicable for the reason

that before they come into play you must *first establish a joint adventure*. If the joint adventure theory be *disregarded*, a rule based upon the existence of a joint adventure is clearly beside the point.

The judgment below can not be maintained on any theory of law except that of a joint adventure. Thus, if respondent pitches his case upon an agreement to create an express trust to obtain an interest in the leaseholds here involved, he runs head-on into the Oklahoma rule that such an agreement must be in writing.[2] No constructive trust or trust by operation of law can arise here, and no such contention has heretofore been made. The action of the courts below, in awarding respondent *an interest* in the leases of *petitioner corporations*, is based entirely *upon the existence of a joint adventure* between petitioner Kasishke and respondent.[3] The "alter ego" theory comes into play only as a *means* of reaching the assets of petitioner corporations, *once the joint adventure is established*. It adds nothing to respondent's *basic premise* and falls when that premise falls.

Respondent next seems to argue (Response, pp. 8, 9) that the court below did *not* hold that it is *not* necessary that there be participation in both profits *and losses*. This, so he can next argue as he does (Response, pp. 8, 9) that there is no conflict between the decisions below and *White* v. *A. C. Houston Lumber Co.*, 179 Okla. 89, 64 P. 2d 908, 910, and the cases following it. We submit, as respondent testified he was *not to share any losses*, that the decision below *must* hold a sharing of losses is *not* a necessary essential of a joint adventure, and it does so hold.[4]

Respondent's present evasiveness is understandable, as he is forced to concede (Response, p. 8) as he does, that the

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[1] Cited along with several other decisions on page 5 of the response.
[2] See Petition, pp. 26-29.
[3] R. 67, 68, 70; 146 F. 2d 114, 116.
[4] 146 F. 2d 115; R. 337.

White case holds that before a joint adventure can exist in Oklahoma there *must* be an agreement "to share in the profits *and losses.*" Respondent then plunges into a tirade (Response, pp. 13-15) against the *White* case, assumes the role of a prophet and prophesies (Response, p. 14) that the Supreme Court of Oklahoma will not "uphold" the *White* case in the future. We reply, until the Supreme Court of Oklahoma reverses the *White* case, it being years later than *E. D. Bedwell Coal Co.* v. *State Industrial Comm.*, 11 P. 2d 527,[5] the *White* case is the controlling law of Oklahoma and should have been followed.

Another "straw" argument appears on page 12 of the response. Respondent in discussing the most recent case on the subject, *Conley Drilling Co.* v. *Rogers*, 191 Okl. 667, 132 P. 2d 959, which approves and "*upholds*" the *White* case, states that the third paragraph of the syllabus, which we quote (Pet. p. 16), reads differently in respondent's copy of the report of the case. The Petition quotes the syllabus as it appears in 132 P. 2d 959 and specifically refers to page 959. The syllabus as quoted appears on the cited page and is fully supported by the text (p. 961) of the opinion.

The response (p. 9) seems to intimate that an agreement to share losses can be *presumed* here because respondent is said to have worked for a "nominal" salary. That rule is inapplicable here as it is conceded by respondent that it was agreed that he was *not* to share even "a dime of loss" (R. 145). There is no room for implication here because the contrary fact is established by an express agreement.

In discussing the statutes of uses and frauds, respondent (Response, pp. 20-22) argues they are inapplicable. But this argument is based *entirely* upon the premise that a *joint adventure was proven.* As we contend a joint adven-

[5] No Oklahoma decision has been found following the ruling as to losses of the *E. D. Bedwell Co.* case. All recent decisions instead follow the *White* case.

ture was *not* established under Oklahoma law, this whole argument falls of its own weight.

Respondent says (p. 22) Sec. 8116, Compiled Oklahoma Statutes, 1921, is inapplicable because respondent's written resignation (R. 33) is not "unqualified." Apparently respondent is now contending he did not renounce the arrangement. This is a novel argument. The trial court found that respondent did renounce and resign and that such resignation terminated the arrangement (R. 62, 65, 70). The argument that respondent was "justified" is irrelevant. The statute is absolute and it is not pitched on *cause*. A partner who renounces for any reason by the plain terms of the statute has no interest in future earnings. The judgment below clearly conflicts with the statute as the Petition shows (pp. 29-31).

Respondent's reply (p. 24) to our argument that specific performance has actually been decreed is specious. The judgment decrees performance and decrees the transfer of an interest in real estate. A more specific performance of the alleged partnership of joint adventure is difficult to comprehend.

Conclusion

In conclusion, we respectfully submit that the Petition for Certiorari should be granted.

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